No. 21767

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Petition of WATERMAN STEAMSHIP CORPORATION, a corporation, owner of the vessel SS CHICKASAW, for exoneration from or limitation of liability,

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GAY COTTONS, INC., *et al.*,

Cargo Claimants,

SHALOM BABY WEAR,

Cargo Claimant,

UNITED STATES OF AMERICA,

Cargo Claimant.

On Appeal From the Judgment of the United States District Court for the Southern District of California.

BRIEF OF APPELLANT WATERMAN STEAMSHIP CORPORATION.

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Jurisdictional Statement.

This is an appeal from a decree entered on October 25, 1965 by the United States District Court for the Southern District of California, Central Division, denying Appellant's Waterman Steamship Corporation, petition for exoneration from or limitation of liability [R. 853].

On February 7, 1962, Appellant's vessel, the American merchant vessel SS CHICKASAW, ran aground upon the shore of Santa Rosa Island off the California coast. Jurisdiction of this admiralty matter was vested in the District Court under Article III, Section 2 of

the United States Constitution and 28 U.S.C. Section 1333 (1). On December 15, 1966 the District Court's order denying Appellant's motion for a new trial was filed [R. 903]. Within thirty days of entry of said order denying Appellant's motion of a new trial, on December 22, 1966, a notice of appeal was filed by Appellant [R. 919]. Jurisdiction is conferred on this court by 28 U.S.C. Sections 1292, 1294 and 2107.

Statement of the Case.

On February 7, 1962, the SS CHICKASAW, owned by Waterman Steamship Corporation (hereinafter called Waterman), ran hard aground on Santa Rosa Island, California. Thereafter, Waterman filed its petition to be exonerated from the result of this standing or, in the alternative, to limit its liability to the amount of the limitation fund, approximately $250,000. Only the liability issue was tried in the District Court. A determination as to damages, if any, will be made when the liability has been finally determined.

From early September 1961 until November 4, 1961, when she departed from Mobile, Alabama, enroute to the Far East, the SS CHICKASAW was subjected to various inspections and examinations. These included a special survey by the American Bureau of Shipping and inspections by the United States Coast Guard and the Federal Communications Commission. Following its inspection the vessel was retained in class by the American Bureau of Shipping which also issued a Load-Line certificate [Tr. pp. 1247-1248]. The Coast Guard conducted an annual examination and passed the vessel. The ultimate objective of this examination was to ascertain whether the CHICKASAW complied

with the statutory requirements, as well as to determine the safety of the vessel and the equipment aboard her [Tr. pp. 841, 1285].

On November 3, 1961, all of the ship's radio equipment passed its annual Federal Communications Commission inspection. The purpose of this inspection was to see that the vessel complied with the Communications Act of 1934 and the requirements of the Safety Convention [Tr. p. 949].

Emanuel Patronas, who had been sailing as master for Waterman since 1948, was given command of the CHICKASAW and reported aboard on November 3, 1961 [Tr. pp. 163, 164, 1165]. Each of the other four deck officers was also licensed by the United States Coast Guard to sail as master [Tr. p. 1362].

The CHICKASAW departed Mobile on November 4, 1961, for Gulf and Pacific Coast ports and then the Far East. The crossing to Japan was uneventful, except that the radar antenna stopped operating a few days prior to arrival. On December 21, 1961, the day following the CHICKASAW's arrival at Yokohama, the radar was inspected and it was determined that some of the teeth on the pinion gear which operated the antenna were broken [Tr. p. 1103]. The repair company could not obtain the part and did not repair the radar [Tr. pp. 1100, 1105]. The replacement part was not available in Japan [Tr. pp. 220, 1064].

The CHICKASAW discharged and loaded at various Far Eastern ports and on January 27, 1962, she departed Yokohama bound for the West Coast of the United States on a course of 094 degrees true, 090 degrees gyro, and a speed of 16.5 knots [Tr. pp. 63, 64].

On February 2, the Captain determined to make his landfall five miles south of South Point Light on Santa Rosa Island, California [Tr. p. 63].

The last celestial fix before the grounding was obtained at noon on February 5. This was by a meridian altitude of the sun which established both longitude and latitude [Tr. p. 299]. On February 6, the noon dead reckoning position was plotted by the 2nd Mate who used a speed of 16.7 knots, course 091 degrees from the preceding noon [Tr. pp. 303, 336].

At noon on February 7, the 2nd Mate also plotted the dead reckoning position on the vessel's chart, for which he assumed a course of 091 degrees gyro and a speed of 16.6 knots [Tr. p. 336]. This position placed the vessel four miles north of the projected track line which was laid out to pass five miles south of South Point [Tr. pp. 63, 71, 336]. At 1446, on February 7, the vessel's engines were put on standby because of low visibility and from that time until the stranding, a bow lookout was posted [Tr. pp. 106, 107]. At 1640 hours, February 7, a radio direction finder (RDF) fix was obtained by taking radio bearings on Point Arguello and Point Sur [Tr. p. 304]. This fix showed the vessel to be five miles north of its projected track line [Tr. p. 101].

After the 1640 fix was placed on the chart [Pet. Ex. 34], the Captain told the 2nd Mate, who was on watch, to run another hour or so on the same course and then take another check [Tr. p. 305]. At 1735, the 2nd Mate obtained an RDF line of position on Point Sur, which the Captain noted, but the Mate was unable to secure a bearing on Point Arguello due to excessive static conditions [Tr. p. 305]. At 1854, RDF

bearings on Point Arguello and Point Sur were obtained [Tr. p. 306]. This fix placed the vessel 11 miles south of its projected track line.

No computation was made between the 1640 and 1854 position. Such a computation would have revealed speed of 17.8 knots and a course of 115 degrees during a period when the vessel was steering 090 degrees.

At 1933, the 2nd Mate obtained a bearing on Point Arguello [Tr. p. 306]. He could not get a bearing on Point Sur at that time "due to a lot of static." [Tr. p. 318]. At 2020, the 3rd Mate obtained and plotted a bearing on Point Arguello [Ex. 52]. The Captain ran the 1933 line of position up to 2020. This indicated he was north (on the Santa Rosa Island side) of his projected track line [Tr. p. 87]. At 2025, the Captain advanced the 1933 line of position to 2020, using a course of 090 degrees and a speed of 16.7 knots. This placed the vessel approximately five miles north of the projected course line [Tr. p. 87]. At 2040, the captain attempted to get an RDF bearing on Los Angeles light at San Pedro breakwater. He was unable to do so as the radio beacon was then over 100 miles away and beyond the effective range of the RDF [Tr. p. 89].

Based on his "instinct" and judgment the Captain, at 2040, assumed the vessel's position [Tr. pp. 97-99].[1] The Captain then projected a course line from his assumed 2040 position and changed course to 098 degrees gyro, hoping to make good a course of 095 de-

[1]The Master testified that he "assumed the ship was there. The two bearings the 2nd Mate took did not coincide with each other so I assumed the ship was a little further south. That is my own judgment." [Tr. pp. 97, 98].

grees true [Tr. p. 100]. The 3rd Mate obtained an RDF bearing at 2110 [Tr. p. 92]. The Captain then made various calculations in the chart room which took a few minutes, and then he went onto the wing of the bridge; two or three minutes later the ship struck bottom [Tr. p. 145]. The grounding took place at 2117 hours on February 7, 1962.

On August 4, 1966, the District Court filed its Memorandum Opinion denying exoneration from or limitation of liability. Findings of Fact and Conclusions of Law were filed October 25, 1966, and the Decree was entered the same date.

Specification of Errors.

1. The deposition of 3rd Mate Jensen was erroneously admitted into evidence.

In the pretrial conference order [R. 348], the admission into evidence of all *completed* depositions was stipulated. Jensen's deposition was not completed and at two places in the record, argument was heard by the Court on the question of the admissibility of the incomplete Jensen deposition. This argument appears in the Reporter's transcript between pages 8 and 15, and again in the Reporter's transcript between pages 673 and 684. The substance of Appellant's objection to the admission of the Jensen deposition in evidence was its complete lack of opportunity to cross-examine Jensen at the deposition.

Only a short portion of Jensen's deposition was read into the record, that portion appearing in the Reporter's transcript between pages 665 and 673. The substance of Jensen's testimony read into the record was that on December 25, 1961, while in the Inland

Sea of Japan, he attempted to use the fathometer and obtained a condition of red flashes around the dial, whereafter he reported to the Master that the fathometer was inoperative. Jensen further testified that subsequent to December 25, 1961, he did not use the fathometer because he believed it to be inoperative. The remainder of the Jensen deposition became part of the record at the trial court when the entire deposition was admitted into evidence as claimants' Exhibit H. No attempt is made here to summarize the remainder of the 48-page deposition as it covers the entirety of the last voyage of the CHICKASAW in some detail, is cumulative of the other evidence received, and no party thought it important enough to read into the record.

2. Conclusion of Law (1) [R. 850] is erroneous in that Finding of Fact (4) [R. 846] shows that the failure of due diligence found by the lower court did not occur until December 25, 1961, after loading at two ports for three days. At the very least, therefore, Appellant is entitled to exoneration as to the cargo loaded on those days.

3. Finding of Fact (6) [R. 848] and Conclusion of Law (3) [R. 851] are based on the erroneous legal proposition that Appellant owed to claimants a non-delegable duty of due diligence to make its vessel seaworthy prior to the commencement of the voyage for the purposes of the limitation of liability statutes. No such duty exists.

Statutes and Rules Involved.

A. The Carriage of Goods by Sea Act, 46 U.S.C. Section 1301, *et seq.*

"1304 (1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of Paragraph (1) of Section 3. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this Section.

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the Master, Mariner, Pilot, or the servants of the carrier in the navigation or in the management of the ships;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representative;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided,* That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and Civil Commotions;

(l) Savings or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier or without the fault or neglect of the agents or servants of the carrier, but the burden of the proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage. . . ."

B. Limitation of Vessel Owner's Liability, 46 U.S.C. Section 181, *et seq.*

> "Section 183 (a). The liability of the owner of any vessel, whether American or foreign for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this Section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending. . . ."

Summary of Argument.

1. Depositions are admitted under the recorded testimony exception to the hearsay rule only when the party against whom they are offered had an opportunity to cross-examine the deponent during his deposition.

2. In the instant action John Jensen's deposition was adjourned as a result of Jensen's illness before Appellant had an opportunity to cross examine him; before the deposition was recommenced, Jensen died. Jensen's deposition, which provides the only causal link between the fathometer and the stranding, was therefore erroneously admitted.

3. The only basis for denial of exoneration was the failure of Captain Patronas to take action after being advised that on December 25, 1961 the fathom-

eter did not operate properly; therefore Appellant, in any event, is entitled to exoneration from loss or damage to cargo loaded prior to that date.

4. Cogsa's non-delegable duty to make seaworthy is not a general duty for the purpose of limitation of liability; if exoneration under Cogsa is denied for failure to use due diligence to make a vessel seaworthy, limitation still must be granted upon a showing that the failure to use due diligence was not that of managerial or supervisory personnel.

5. For the purposes of limitation of liability, the negligence of a master in failing to exercise due diligence to repair or check navigational equipment in foreign ports, when that responsibility has been delegated to him by owners, is not imputed to owners to deny limitation.

ARGUMENT.

I.

Introduction.

This action combines the elements of two law suits. The first deals with exoneration under the Carriage of Goods By Sea Act, 46 U.S.C.A. § 1301 *et seq.* (hereinafter referred to as Cogsa), and the second limitation of liability from the results of a maritime casualty to the value of the vessel and the then pending freight under 46 U.S.C. § 183. The elements were presented to the lower court in a single petition for exoneration or limitation by Appellant under the provisions of the Supreme Court Admiralty Rule 53. The trial court held that Appellant was not entitled to either exoneration under Cogsa or to limitation of its liability under the Limitation of Liability Statute.

Appellant's argument on this appeal has three phases. First, Appellant contends that it was erroneously denied exoneration under Cogsa, because the testimony of third mate Jensen, upon which the denial of exoneration was predicated, was erroneously admitted. Second, Appellant contends that irrespective of the disposition of its general contentions with respect to exoneration and limitation of liability, it was improperly denied exoneration with respect to cargo loaded on board the CHICKASAW on or before December 25, 1961. Finally, Appellant contends that based on the lower court's findings, even if the denial of exoneration is sustained, it was entitled to limitation of liability as a matter of law.

II.

The Deposition of John Jensen Was Erroneously Admitted Into Evidence.

Over Appellant's objection, the incomplete deposition of Jensen, 3rd Mate of the CHICKASAW at the time of the casualty, as well as his Coast Guard testimony, were admitted into evidence [Tr. pp. 681, 682].[2] The deposition was halted because of Jensen's illness, subject to continuation by claimants who had not completed their direct examination. The Appellant did not waive cross-examination, nor was the failure to obtain it in any way attributable to Appellant [See Claimants' Ex. H, Deposition of John Jensen]. When claimants sought to resume the deposition in May of 1963, it was learned that Mr. Jensen had died. Therefore, the deposition should have been suppressed. *Inland Bonding Company v. Mainland National Bank of Pleasantville*, 3 F.R.D. 438 (1944).

It is noteworthy that:

> "The common law judges and lawyers for two centuries have regarded the opportunity of cross-examination as an essential safeguard of the accuracy and completeness of testimony, and they have insisted that cross-examination is a right and not a mere privilege. This right is available, of course, upon the taking of depositions, as well as on the examination of witnesses at the trial. This premise that the opportunity of cross-examination

[2]The Coast Guard transcript was offered by claimants to prove that Mr. Jensen testified substantially the same at the Coast Guard investigation, where there was cross-examination, as he did under direct examination by claimants at his deposition. [Tr. pp. 674, 675]. We submit that the evidence proves to the contrary, as will be noted below.

> is an essential safeguard is the principal justification for the exclusion generally of hearsay statements, and for the admission as an exception to the hearsay rule of reported testimony taken at a former hearing when the present adversary was afforded the opportunity to cross-examine . . . What are the consequences of a denial or failure of the right? Thre are several common situations . . . The fourth situation is that of the death of the witness before the cross-examination. Here again it is usually said that the party thus deprived of the cross-examination is entitled to have the direct testimony stricken, unless, presumably, the death occurred during a postponement of the cross-examination consented to or procured by him." *Hornbook on Evidence,* McCormack—page 40.

Absent cross-examination, the Jensen deposition was inadmissible hearsay. *Rutherford v. Geddes,* 4 Wall. 220, 18 L. Ed. 343 (1867). Absent a showing by claimants that Appellant had the opportunity to cross-examine, or that the responsibility for having failed to cross-examine was in some way attributable to Appellant, the deposition of Jensen should have been suppressed. An analysis of the cases involving the issue of admissibility of a deposition where no cross-examination took place reveals that in each of the cases where the testimony was admitted, except the *Inland* case, the objecting party had conducted its examination. See for example, *Derewecki v. Penn. R.R.,* 353 F. 2d 436 (3rd Cir. 1965); *Frederick v. Yellow Cab Co.,* 200 F. 2d 483 (3rd Cir. 1952); *Paul v. American Surety Company of New York,* 18 F.R.D. 68 (1965); *Rosenthal v. Peoples Cab Company,* 26 F.R.D. 116 (1960); *Weiss v.*

Weiner, 10 F.R.D. 387 (1950); and see *Mid-City Bank & Trust Company v. Reading Company,* 3 F.R.D. 320 (1944), where the court at page 322 said:

> "The rules of evidence were designed to obtain the truth. They are intended to exclude testimony that is unreliable, such as hearsay, and testimony that is false and dishonest. The safeguards set up to combat testimony of this character are the oath and the right of the adverse party to cross-examine the witness. The omission of either of these tests of testimony will usually render the testimony objectionable."

The suppression of the deposition is of critical importance here. Mr. Jensen's deposition testimony concerning the characteristics of the fathometer which he observed formed the basis for his opinion that the fathometer was defective.

There was no opportunity to examine the witness concerning his knowledge or lack of knowledge of the other factors which can cause the flashing phenomenon he observed. As an example, claimant's fathometer expert, Mr. Harrison, testified that multiple flashing which could not be adjusted away could be caused by a motor or interference of some kind from the vessel itself [Tr. pp. 714-716]. Captain Slack testified that the condition could have been caused by a school of fish or turbulence of the sea [Tr. p. 500].

An examination of the deposition reveals that Jensen testified that he was the 8 to 12 watch officer (the grounding occurred during his watch) and he did not use the fathometer because "the last time I used it she was spinning around the dial." [Tr. p. 665]. Further

examination by claimants revealed that Mr. Jensen was referring to the red light which appears on the face of the fathometer dial. Mr. Jensen further testified that he tried to adjust the gain control to prevent the red light from appearing all over the face of the dial but he was unsuccessful [Tr. pp. 670-672].

Contrary to claimants' contention that the Coast Guard testimony of Mr. Jensen was substantially identical with his deposition testimony, in fact, at the Coast Guard hearing the witness stated that the fathometer could not be expected to work well in water of the depth where he had concluded that it was defective! The testimony is as follows: [Coast Guard Ex. "I", p. 228]

> "Q. . . . Hw much water would you have had under the keel on the Inland Sea, you figure? Was it ten feet? A. I would say approximately that, or fifteen. Ten, fifteen feet. That's just for the small distance while we changed the pilot.
>
> Q. Would the fathometer ordinarily work in that little depth of water under the keel? A. Not very good."

Of major significance is the time factor. The Coast Guard hearing was before Mr. Jensen's deposition. At the Coast Guard hearing, Appellant had an opportunity to cross-examine and the net effect of Mr. Jensen's testimony was undamaging regarding the condition of the fathometer. Thereafter, Mr. Jensen's deposition was taken and a lack of opportunity to cross-examine ensued. Neither Mr. Jensen nor any ship's officer had interests

in common with Appellant. The Coast Guard investigation was, among other things, aimed at determining whether action should be taken against their licenses or that of any of them. The investigation was not a substitution for Appellant's lack of cross-examination at the deposition. It was apparent from the beginning that Appellant's defense to the present action would be based upon "negligent navigation and management," the exception of the Carriage of Goods by Sea Act provided for at U.S.C. 46, Section 183. The success of this defense meant proof of negligence by one or more of the ship's officers. Cross-examination of the deposition testimony was, therefore, essential in order for this testimony to avoid the bar of the hearsay rule. The incomplete deposition gives the reader the feeling that Mr. Jensen would have used this equipment but for his feeling of its defective condition. The unmistakable conclusion from the complete Coast Guard transcript is that Mr. Jensen was far too busy on the wing of the bridge looking for "discolored water." [Coast Guard Ex. "I", p. 210]. After 2000 hours, he was on the port wing of the bridge "all of the time." [Ex. "I", pp. 210, 229]. The Captain was in and out of the chart room [Ex. "I", p. 245]. It was the Captain who was on the bridge during Jensen's watch until the grounding and who testified that he did not consider using the fathometer because "I didn't think the ship was in that shallow of water to start with. Secondly, I wasn't thinking." [Tr. p. 153].

Further, the Court's conclusion that Jensen would have used the fathometer on the right of the stranding but for the fact that he believed it was inoperable is based upon a single leading question propounded by counsel for Appellee in his deposition and which did not specifically relate to the time of the stranding [Tr. p. 673]. On the other hand the Coast Guard transcript [Ex. I] ascribes Jensen's failure to use the fathometer to other reasons. For example, at page 293 of that transcript was the following exchange:

> "Q. Why didn't you turn the fathometer on? A. Well, looking at the chart, that's only a mile and a half from the shoreline there before we got fifty feet—
>
> Q. Fathoms. A. Oh, fathoms, pardon me, and that goes kind of steep from the shoreline.
>
> Q. Yeah but if you have your fathometer on, you would have picked up that 50 fathom and knew you were getting into bad water wouldn't you? A. Well,—"[3]

---

[3]The last question asked of Jensen was never answered and the examination then moved to another point. Later in Jensen's Coast Guard testimony, at page 251, the following sequence took place:

> "Q. What was the main reason for not using the fathometer? A. Well, it was out of order, in my opinion.
>
> Q. It was out of order in your opinion? A. Yes Sir.
>
> Q. If it was in working order, could it have prevented this casualty? A. Due to the short distance between the shoreline and—I would say that if it had been working 100 percent, I mean, in perfect order, probably, but it was such a short distance from the shoreline and we have—
>
> Q. What's the capacity of the fathometer? How deep would it read? A. I believe it's 200 fathoms.
>
> Q. How far is the 200 fathom line off Santa Rosa

In view of this testimony the Coast Guard transcript standing alone could not support the Court's Findings of Fact 4 [R. 846]. It was therefore critical that Appellant be given an opportunity to cross-examine Jensen with respect to this subject; the prejudice to Appellant from lack of cross-examination on this subject is made more vivid, not less, by Jensen's Coast Guard testimony.

In summary then, the testimony of Jensen should be stricken as it was inadmissible hearsay. Appellant's lack of opportunity to cross-examine was clearly prejudicial as the Jensen testimony is the only basis for a casual connection between the fathometer and the stranding.

Island? A. It's—200 that's approximately—that's the 200 fathom (indicating on the chart), about 11 miles.

Q. About 11 miles. How long would it take the vessel to cover 11 miles? A. At that speed, about 35 minutes, approximately.

Q. Or, a little longer? A. A little longer, yeah."

Finally, at page 252 of the Coast Guard Transcript the following exchange:

"Q. Do you know for sure whether the fathometer was in working condition or not? You stated that it didn't perform satisfactorily in shallow water. Would it perform satisfactorily in deep water, do you know? A. No, I doubt that.

Q. What— A. In fact I didn't try it out after the Inland Sea experience.

Q. So it might have worked allright in deep water, then? A. Anyway, I found out, just like I mentioned in the Inland Sea, well it didn't work so I told them, 'well, it's just plain out of order' ".

III.

Appellant Is Entitled as a Matter of Law to Exoneration for Cargo Loaded Prior to December 25, 1961.

The trial court's judgment denying Appellant both exoneration and limitation as to all cargo carried from the Far East is on its face erroneous with respect to that cargo loaded prior to December 25, 1961, regardless of the court's decision with respect to the other issues on this Appeal. The court found in Finding Two [R. 844] that cargo was loaded at Nagoya, Japan, on December 22 and 23, and at Kobe, Japan, on December 24, 1961. Claim for damages and/or loss of this cargo has been made in this proceeding. The precise cargo involved, and the value thereof, has not yet been ascertained in view of the bifurcation of this matter for trial with the damage issue left for a subsequent hearing. It is clear, however, from the court's remaining findings, and in particular, Finding Four [R. 846], Finding Five [R. 847], and Finding Eleven [R. 850], that but for Captain Patronas' negligence in failing to repair or check the fathometer after notification of uncertainty as to its condition on December 25, 1961 (after departure from Kobe, Japan), exoneration would have been granted under the provisions of 46 U.S.C. § 1304 (2) relating to negligent navigation. Thus at a minimum Appellant is entitled to exoneration for loss or damage to the cargo loaded prior to that time. The judgment and Findings of Fact and Conclusions of Law should be modified, even if this court does not reverse the denial of exoneration generally, or of limitation, to grant exoneration to Appellant with respect to such of that cargo loss or damage which occurred to cargo loaded prior to the vessel's departure from Kobe on December 25, 1961.

IV.

Based on the Lower Court's Findings, Limitation of Liability Should Have Been Granted as a Matter of Law.

A. Introduction.

The critical portion of the court's Findings and Conclusions with respect to limitation of liability is Finding Six, "WATERMAN'S PRIVITY, FAULT AND KNOWLEDGE" [R. 848].[4] Analytically this finding breaks down as follows:

(1) Appellant had an obligation to exercise due diligence to make the CHICKASAW seaworthy at Far East ports;

(2) The responsibility of fulfilling this obligation, with respect to repairs of navigational equipment, was delegated to the vessel's master Captain Patronas;

(3) Captain Patronas was negligent in fulfilling this duty because of his failure to take action regarding the fathometer after December 25, 1961; and

(4) Since Appellant has no supervisory or managerial personnel in the Far East, but had delegated responsibility regarding repairs to Captain Patronas, his negligence in carrying out these duties is imputed to Appellant which therefore had privity and knowledge of his negligence.

The conclusion (point 4 above) is clearly predicated upon the proposition that for the purposes of the Limitation of Liability Statute *Appellant* had a general, non-

[4]Conclusion of Law 3 stating, "Said unseaworthiness existed with the privity and knowledge of petitioner Waterman Steamship Corporation." is merely the ultimate conclusion drawn from the legal propositions stated in and implicit in Finding of Fact Six.

delegable duty to exercise due diligence to make the CHICKASAW seaworthy at all ports in the Far East. This is an erroneous legal proposition, without authority, either legislative or judicial, resulting from a confusion of Cogsa concepts and Limitation of Liability concepts. A clear understanding of the relationship between Limitation of Liability and Cogsa compels the conclusion that what is a general non-delegable duty under Cogsa is not such a duty under the Limitation of Liability Statutes. Even when exoneration under Cogsa is denied for a failure to exercise due diligence to make a vessel seaworthy, limitation must be granted if the failure is that of nonmanagerial, nonsupervisory personnel, a category that clearly includes a vessel's master.

These points will be further elaborated first, by examining the history of Limitation of Liability and its relationship to Cogsa (and the preceding Harter Act), second, by discussion of the more recent authorities dealing with the effect of delegation of responsibility to a vessel's master upon Limitation of Liability, and finally, by explanation of the proper relationship between Cogsa and Limitation of Liability.

B. Historical Analysis.

Prior to the enactment of the Limitation of Liability Statutes in 1851 (which was also prior to the enactment of the Harter Act, 46 U.S.C. § 190 *et seq.*, in 1893 and Cogsa in 1936) the general law of maritime carriage made the public carrier of goods by sea essentially an insurer of safe carriage, except for the loss of damage that was caused by act of God or public enemy, inherent vice of the goods, or fault of the shipper. The shipper's only burden of proof was to

show delivery of its goods to the carrier in good order and either non-delivery or re-delivery in bad order. When Bills of Lading came into use, shipowners began setting out contractual exceptions in addition to the common law exceptions. Ultimately these contractual exceptions, when accepted by the courts, eliminated liability even for unseaworthiness and negligence. The concept of due diligence was irrelevant to the question of the shipper of cargo's recovery.[5] Either the shipowner was liable as a common carrier in the absence of exculpation in the bills of lading or it was not liable as a result of such exculpation.

At this stage in the development of American law of maritime carriage it was not entirely clear whether or not that law, without legislation, incorporated the doctrine of limitation of liability as developed in other maritime nations and as represented by statute of England. This question was resolved against the incorporation of the limitation doctrine in the case of the *LEXINGTON,* 6 Howard 342, 12 L. Ed. 456 (1848). This decision, which imposed full liability for the loss of bullion on board the LEXINGTON when it burned and sank, resulted in the enactment of the Limitation of Liability Statutes in 1851. These statutes were passed in substantially the same form as they presently exist with subsequent modifications principally dealing with the loss of life situation.

Historically the Limitation of Liability Statutes evolved out of prior maritime, as opposed to civil, law developed for the purpose of insulating the vessel owner

[5]Except occasionally insofar as it bore on the public policy question of the validity of exculpatory clauses in bills of lading.

from the acts of negligence of the master of the vessel by limiting the owner's liability to the value of the vessel. The Supreme Court, in *Norwich and N.Y. Trans. Co. v. THE WRIGHT,* 13 Wall. 104, 20 L. Ed. 585 (1872), the first Supreme Court case extensively analyzing this country's Limitation of Liability Statute, summarized this history as follows:

> ". . . it originated in the maritime law of modern Europe; that whilst the civil, as well as the common law, made the owner responsible to the whole extent of damage *caused by the wrongful act or negligence of the master or crew,* the maritime law only made them liable (if personally free from blame) to the amount of their interest in the ship. So that, if they surrendered the ship, they were discharged. . . . The maritime law, as codified in the celebrated *French Ordonnance de la Marine,* in 1681, expressed the rule thus: 'The proprietors of vessels shall be responsible for the acts of the master, but they shall be discharged by abandoning the ship and freight'. Valin in his commentary on this passage, lib. 2 tit. 8, art. 2, after specifying certain engagements of the master which are binding on the owners, without any limit of responsibility, such as contracts to the benefit of the vessel, made during the voyage (except contracts of bottomry) says: 'With these exceptions, it is just that the owners shall not be bound for the acts of the *master,* except the amount of the ship and freight.' " (emphasis added).

That this historic rationale of insulating the vessel owner from the acts of negligence of the master and crew was the purpose of the American Limitation of

Liability Statute was made clear in one of the earliest Supreme Court cases decided under that statute, *Walker v. The Western Transportation Co.,* 3 Wall. 150, 18 L. Ed. 172 (1866). In that case the question presented to the court for decision was stated as follows:

> "1. Is the owner of a vessel used in the trade on the Lakes, liable, independent of contract, for a loss by fire which occurs without any design or neglect of its owner, although it may be traced to negligence of some of the officers or agents having charge of the vessel?"

The court answered that question as follows:

> "The language of the 1st section is, that no owner or owners of any ship or vessel shall be liable to answer for any loss or damage, which may happen by reason or means of fire on board such ship or vessel, 'unless such fire is caused by the design or neglect of such owner or owners.' The owners are here released from liability for loss by fire, in all cases not coming within the exception. The exception is of cases where the fire can be charged to the owner's design, or the owner's neglect.
>
> "When we consider that the object of the Act is to limit the liability of owners of vessels, and that the exception is not in terms of negligence generally, but only of negligence of the owners, it would be a strong construction of the Act, in derogation of its general purpose, to hold that this exception extends to the officers and crews of the vessel as representing the owners.
>
> "If, however, there could be any doubt upon the construction of this section standing alone, it is removed by a consideration of the Sixth Section of

the same Act. [now Section 187]. This enacts that nothing in the preceding Sections shall be construed to take away or affect the remedy to which any party may be entitled against the master, officers, or mariners of such vessel, for negligence, fraud or other malversation. This implies that it was the purpose of the preceding Sections to release the owner from some liability for conduct of the master and other agents of the owner, for which these parties were themselves liable, and were to remain so; and that is stated to be their negligence and fraud.

"We are, therefore, of the opinion that in reference to fires occurring on that class of vessels to which the Statute applied, the owner is not liable for the misconduct of the officers and the mariners of the vessel in which he does not participate personally."

The *Walker* case *supra,* involved the Fire Statute section (Section 182) of Limitation of Liability Statute; *Norwich and N.Y. Trans. Co. v. THE WRIGHT, supra,* made it clear that the position of the master was the same in cases involving Section 183. The *Norwich* case was the first interpreting those portions of the Limitation Act which require the establishment of a Limitation Fund. In interpreting that Section the Court said:

"The Section [section 183] as constructed limits the ship-owners' liability in three classes of damage or wrong happening without their privity, and by the fault or neglect of the master or other persons on board, viz: 1, damage to goods on board;

2, damage by collision to other vessels and their cargo; 3, any other damage or forfeiture done or incurred.

"In view of the fact the limited liability of shipowners was, by the general maritime law, *extended to all acts of the master* except contracts for the benefit of the ship, and in most places even to these; and to the fact that the English Statutes expressly extend it to cases of collision as well as to injuries to cargoes, we see no reason why the fair natural construction should not be given to the Act of 1851, which makes an equally broad application of the rule, and there is nothing in the reason of the thing that should lead us to evade such a construction." (emphasis added).

See also *Craig v. Continental Insurance Co.,* 141 U.S. 638, 35 L. Ed. 886 (1891).

Thus at the time of the enactment of the Harter Act in 1893 the United States Limitation of Liability Statutes preserved the historic concept of immunization of the vessel owner from the negligence of the master or crew. It did not effect the general rules of liability between a shipper of cargo and a carrier by sea (with the exception of the case of loss by fire and loss of certain articles of high value in relationship to size, see 46 U.S.C. Sections 181 and 182) but simply provided a limitation to that liability in the event of a casualty of sufficient size to make the loss in excess of the "Limitation Fund". The Limitation of Liability Statutes further were not limited to dealing with the

problems of carriage of goods by sea but dealt with loss and damage to other property and to personal injury as well. See *Norwich and N.Y. Trans. Co., v. THE WRIGHT, supra.*

The Harter Act, on the other hand, was specifically designed to deal with the limited problem of *liability* between the shipper of goods and the common carrier by sea. At this juncture the law with respect to a vessel owner's liability to cargo interests remained basically an all or nothing proposition; either the shipowner was, with few exceptions, absolutely responsible for damage to the cargo owner's goods while in his custody, or he was not responsible at all as a result of exculpatory causes in the Bills of Lading. The Harter Act was designed to effect a compromise between these two positions. It invalidated contractual clauses in Bills of Lading for public carriage by sea purporting to exempt the owner from liability for negligence or unseaworthiness, but expressly permitted Bills of Lading clauses exonerating the owner from liability for the result of negligent navigation or management of the vessel, if the shipowner had used due diligence to make the vessel seaworthy. Under the Harter Act the shipowner, once cargo established its *prima facie* case, had to prove not only that the loss or damage resulted from negligent navigation or management, but also that it used due diligence to make the vessel seaworthy in all respects, whether or not related to the cause of loss. The *ISIS*, 290 U.S. 333, 54 S. Ct. 162 (1933). Then in 1924, an international convention agreed upon the "Hague Rules", governing the carriage of goods by sea and based upon the example of the Harter Act. These rules were ultimately adopted by the major mari-

time nations (with some variations), the United States adopting them in 1936 as Cogsa.[6]

The mediating mechanism through which both the Harter Act and Cogsa effected a compromise between the position of the shipowner under the common law of carriage of cargo and its position under Bills of Lading exculpating it entirely for damage from any cause, was the concept of due diligence to make seaworthy. This concept incorporated into the determination of liability between shipowner and shipper a specialized negligence concept previously foreign to that relationship. However, both the Harter Act (in what is now Section 196 of that Act) and Cogsa (in what is now Section 1308 of that Act) expressly disclaimed any intent that those Statutes adjusting the concepts of liability between shipper and shipowner should affect any change in the Limitation of Liability provisions.[7]

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[6]There are some important differences between the Harter Act and Cogsa. Specifically Cogsa added to negligent navigation and management of the vessel fifteen additional excepted causes for which shipowners would not be liable (Section 1304 (2) (b) through (q) and changed the burden of proof so that under Cogsa the shipowner, if it shows that the loss was in part caused by one of the specific exemptions (1304) (2) (a)-(b)) need only show due diligence to make the vessel seaworthy if the cargo owners show the loss to have been caused by unseaworthiness. *Firestone Synthetic Fibers Co. v. MS HERRON,* 324 F. 2d .... (2nd Cir. 1963). These differences, however, as important as they are for determination of the right of a shipowner to exoneration under the terms of the statute in question, are not relevant to the relationship between either the Harter Act and Cogsa on the one hand, and the Limitation of Liability Statutes on the other.

[7]Section 196 of the Harter Act provides as follows:
"Sections 190-195 of this title shall not be held to modify or repeal sections 181, 182 and 183 of this title, or any other statute defining the liability of vessel, their owners, or representatives." And section 1308 of Cogsa provides:
"The provisions of this chapter shall not effect the rights

(This footnote is continued on the next page)

Despite this express disclaimer it was perhaps inevitable that the contention would be raised that the Harter Act and/or Cogsa created a general non-delegable duty on shipowners to use due diligence to make their vessels seaworthy prior to the commencement of the voyage, failing which they would be denied the benefits of the Limitation of Liability Statutes.

This precise problem was raised in *Earle & Stoddard v. Ellerman's Wilson Line,* 54 F. 2d 913 (1931), aff'd 287 U.S. 420, 77 L. Ed. 403 (1932). This case involved a claim for limitation of liability by the vessel owner under 46 U.S.C. Section 182 (the so called fire statute portion of the Limitation of Liability Act which, while utilizing different language than Section 183 is interpreted in identical fashion, *Consumers Import Co. v. Kabushiki Kaisha,* 133 F. 2d 781, 784 (2nd Cir.), aff'd 320 U.S. 249 (1940)). In the *Earle & Stoddard* case, the chief engineer of the vessel *Galileo* negligently placed a new supply of coal on top of old coal, then known to be heated, prior to the commencement of the voyage in question. Not long after departure, the coal was found to be aflame due to spontaneous combustion and the vessel ultimately sank with loss of the entire cargo. In answer to a libel brought by the cargo owners against the vessel owner, the vessel owner pleaded as a defense 46 U.S.C. Section 182. The District Court held Section 182 a valid defense for the libel and was affirmed by the Court of Appeals. That Court, in distinguishing the Supreme Court's opinion in the prior

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and obligations of the carrier under the provisions of the Shipping Act, 1916, or under the provisions of Sections 175, 181-183 and 183 (b)-188 of this title, or of any amendments thereto; or under the provisions of any other enactment for the time being in force relating to the Limitation of Liability of the owners of sea-going vessels."

case of *Republic of France v. French Overseas Corp. (The Malcolm Baxter, Jr.),* 277 U.S. 329 (1928) stated as follows:

> "It will be noticed that the failure to exercise due diligence was referred to as that of the Respondent, the vessel owner. *Had it been only that of the vessel's master, the benefits of the Harter Act would have been lost, but not the benefits of the Limitation of Liability Act, under* the authorities. Sec. 483 (46 U.S.C.A. Section 183) permits limitation of liability for loss or damage to cargo caused 'withot the privity, or knowledge of such owner.' The phrase quoted has been construed to refer to some personal fault of the owner or his 'higher representatives,' and not to exclude limitation merely because of negligence on the part of the ship's officers. . . . We feel confident that the Supreme Court did not intend by this brief reference to the limitation statute to modify the long-established construction of the phrase 'without the privity or knowledge of the owner.' Unseaworthiness of a vessel has nothing to do with limitation of liability by the owner unless it exists with the owner's privity or knowledge. Lack of diligence to make the vessel seaworthy is therefore immaterial unless it is within the owner's privity of knowledge. Unless this be borne in mind, the use of the phrase 'lack of diligence to make seaworthy,' which under the Harter Act is not limited to the owner's personal failure in diligence, may well lead to confusion when applied to the limitation act. In the case of The Malcolm Baxter, Jr., as appears from the decision of the District Court, 55 F.(2d) 312,

> the vessel's hull had defects which an inspection would have disclosed, but the owner did not provide a suitable person to inspect the vessel, which it had purchased without any warranty of seaworthiness in the bill of sale. Hence the lack of diligence was the owner's, and the loss resulting from unseaworthiness was within the owner's 'privity.' So understood, the case is quite in line with earlier authorities. In the case at bar, however, the lack of diligence was that of the chief engineer, and the owner was not only not in privity with the engineer's default, but was found by the court to be free from personal neglect."

The Supreme Court also affirmed the *Earle & Stoddard* case. The cargo owners contended that the duty to use due diligence to make the vessel seaworthy prior to the commencement of the voyage is non-delegable and as the loss resulted from such a failure, limitation should not be granted. The Supreme Court dealt with that contention as follows:

> "The fire statute, in terms, relieves the owners from liability 'unless such fire is caused by the design or neglect of such owner.' The statute makes no other exception from the complete immunity granted. The cargo-owners do not make the broad contention that the statute affords no protection to the vessel owner, if the fire was caused by unseaworthiness existing at the commencement of the voyage. Their contention is that it does not relieve the owner if the unseaworthiness was discoverable by due diligence. The argument is that the duty of the owner to make the ship seaworthy before starting on her voyage is non-delegable,

and if the unseaworthiness could have been discovered by due diligence, there was necessarily neglect of the vessel owner. . . .

"The cargo owners rely chiefly upon *International Nav. Co. v. Farr & B. Mfg. Co.,* 181 U.S. 218, 45 L.Ed. 830, 21 S.Ct. 591, and *THE WILDCROFT (W.J. McCahan Sugar Ref. Co. v. THE WILDCROFT*), 201 U.S. 378, 50 L.Ed. 794, 26 S.Ct. 467. Those cases involve the construction of the Harter Act; and the language there employed is different. The Harter Act provides in Section (3) that the vessel owner shall not be liable if he 'shall exercise due diligence to make the said vessel in all respects seaworthy.' (Feb. 13, 1893, 27 Stat. at L. 455, Chap. 105 U.S.C. Title 46, Sec. 192.) And under the Act the requirement of due diligence is not satisfied if there is negligence on the part of any of the ship's employees. *International Nav. Co. v. Farr & B.Mfg. Co., supra.* But the Act does not purport to create any general duty on the part of shipowners. Its requirement of due diligence is imposed as a condition of securing immunity from liability for certain kinds of losses, like those due to errors in navigation or management. But the provisions of the Harter Act do not refer to liability from losses arising from fire is made clear by section (6), which declares that the act 'shall not be held to modify or repeal §§ 4281, 4282 and 4283 of the revised statutes', § 4282 being the fire statute. The Courts have been careful not to thwart the purpose of the fire statute by interpreting as 'neglect' of owners the breach of what in other connections is held to be a non-delegable duty."

In 1935 not long after the Supreme Court in *Earle & Stoddard* rejected the attempt to incorporate the Harter Act and Cogsa due diligence standard into the "privity or knowledge" standard of the limitation statutes, the first major set of amendments to the Limitation of Liability Statutes was enacted. As ultimately enacted these amendments did not effect the rights of the cargo claimants under the Limitation of Liability Act; however, an attempt was made to expand the meaning of "privity or knowledge", to include the "privity or knowledge", and, of course negligence, of the master of a vessel at and prior to the commencement of the voyage. Had this attempt been successful it would have had the effect of partially incorporating the non-delegability concept of the Harter Act and Cogsa into Limitation of Liability Statute as it effects cargo claims by making the shipowner responsible for the privity or knowledge or fault of the master. The legislative history of these amendments, therefore, is of considerable interest in analyzing the proper rule with respect to imputation of the negligence of the master of a vessel for purposes of preventing limitation of liability. It shows a rejection by Congress of the concept of imputing the master's negligence to the owner in cargo cases.

The original Bill presented to Congress was house resolution 4550 introduced by Congressman Sirovich. That Bill provided, in part, as follows:

> "181. Privity or knowledge—the privity or knowledge of the master of a vessel, or of the super-

vising or managing agent of the owner or owners thereof, shall be deemed the privity or knowledge of the owner or owners", Hearing On House Resolution 4550 before Committee on Merchant Marine Fisheries 74th Cong. First. Sess. Page 2.[8]

Had the section as originally proposed been enacted, the result reached by the trial court in this matter, assuming for the purposes of argument the correctness of the court's finding with respect to Patronas' negligence would have been correct. The master was negligent, therefore under the proposed section the owners would have privity or knowledge.

Most of the two hundred plus pages of the hearing on House Resolution 4550 focused on precisely this provision with respect to privity or knowledge. During the course of the hearings, the American Steamship Owners' Association proposed an alternative bill for consideration of the committee, stressing the difference between its bill and the original bill on the question of privity or knowledge; the Association's proposal leaving the privity or knowledge language of the original statute of 1851 unchanged.

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[8]While the proposed amendment added, in addition to the master, the supervising or managing agent, as parties whose privity or knowledge would be imputed to the owner, Congress recognized that the prior case law indicated the privity or knowledge of the supervising or managing agent of the owners would be imputed to owner without such amendment and that the only new facet added by this proposed amendment would be the imputation of the privity or knowledge of the master. See House Report No. 2517, the Committee of Merchant Marine and Fisheries, 74th Cong. Second Sess. at pages 2 and 5.

As a result of this debate the form of the amendment with respect to privity and knowledge was modified. The final form of the bill was added as part of 46 U.S.C. Section 183 and reads as follows:

> "*In respect of loss of life or bodily injury* the actual privity or knowledge of the master of a seagoing vessel, or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel." (Emphasis added).

Thus the matter stood until the next year when both the original authors of the amendments and vessel owning interests proposed further modification and clairification of the Limitation of Liability Statutes. The basic proposal, in addition to adding some sections not relevant herein, was to divide 46 U.S.C. Section 183 into subsections to clarify the intent of the statute. One of the purposes in so doing was stated as follows; at page 2 of House Report number 2517, Committee On Merchant Marine and Fisheries, 74 Cong. Second Sess.:

> "During the course of the hearings on the bill [House Resolution No. 9969], there were brought to the attention of the Committee certain ambiguities and uncertainties in the above quoted provisions of the 1935 Act [privity and knowledge provisions], as a result of which insurance rates on cargo vessels have increased between ten and fifteen percent. *It is the belief of the Committee that the committee amendments will make certain the manner in which the increased liability in respect of loss of life and bodily injury will oper-*

ate, and that such operation will not only to a greater extent increase the protection of the lives of persons traveling on vessels which sail the high seas, but also leave undisturbed the position which cargo claimants have had since the enactment in 1851 of the original Limitation of Liability Act." (emphasis added).

Thus the legislative history of the 1935 and 1936 amendments to the Limitation of Liability Statutes re-affirms the congressional intent to follow the historic rationale of Limitation of Liability Statutes by specifically rejecting an attempt to make the privity or knowledge of the master of a vessel the privity or knowledge of the owner with respect to cargo cases. The history also clearly reveals the legislative intention to limit the imputation of the privity or knowledge of the master specifically to cases involving loss of life and bodily injury.

Our excursion into the history of the Limitation of Liability Statutes demonstrates the following:

(1) The historic rationale of Limitation of Liability Statutes was the insulation of the owner of a vessel from the negligence of the master and crew members of that vessel;

(2) That the non-delegable duty of due diligence to make seaworthy first brought into the law relating to the carriage of cargo by sea by the Harter Act and Cogsa was not intended to modify in any way the rights and obligations of a vessel owner under the Limitation of Liability Statute; the Supreme Court expressly rejected an attempt to incorporate this non-delegable duty standard in the Limitation of Liability Act in the *Earle & Stoddard* case;

(3) That an attempt to amend the Limitation of Liability Act to bind the shipowner in cargo cases with the privity or knowledge or fault of the vessel's master was consciously rejected by the Congress with the intent of retaining in cargo cases the historic position of the shipowner/cargo claimants as set forth in (1) above.

C. The Master and the Case Law.

Analysis of the cases relating to imputation of the master's negligence to the shipowner in limitation of liability situations demonstrates that the historic rationale of the Limitation Act of insulating the shipowner from negligence of the master or crew has been carried forward up to the present in a variety of situations. These same cases demonstrate a continuing rejection, based principally on the *Earle and Stoddard* case, of the concept that the non-delegable duty standards of the Harter Act and Cogsa are pertinent to Limitation cases.

In *The YUNGAY*, 58 F. 2d 352 (S.D.N.Y. 1931), a vessel stranded with loss of its entire cargo due to bad seamanship of the master, coupled with defective compasses. Exoneration was denied because of the condition of the compasses at the commencement of the voyage. The owner relied upon the master to repair the compasses prior to the start of the voyage. Limitation of liability was granted. The court first rejected cargo owner's claim that repair of the compasses was a non-delegable duty, saying:

> "The Act would fail of its purpose, the encouragement of the business of navigation, if full liability could be visited upon owners through the creation and imposition on them of non-delegable duties."

The court then dealt with the question of imputing the master's negligence to owners as follows:

> "In short, the proof indicates that the owner rested the duty of adjusting the compasses upon an agent [the master] who was believed by him, not without reason, to be competent to do the job. This being the case, the owner is entitled to limit his liability for loss occasioned by the agent's nonperformance of the duty laid upon him."

See also *The ARIEL*, 33 F. 2d 573 (S.D.N.Y. 1940), at page 575.

In *Hartford Accident & Indemnity Co. v. Gulf Refining Co.*, 230 F. 2d 346 (5th Cir. 1956), the pilot, then acting as master of an integrated oil tow, negligently failed to fulfill his duty to ascertain that the flanges on the end of the discharge lines were secured prior to the commencement of the voyage. As a result, when the tow arrived at the port of discharge, an explosion ensued because of the fumes from one of the discharge lines which did not have a flange. The vessel owner pleaded the so-called fire statute portion of the Limitation of Liability Act as a defense to the cargo owner's claim for cargo damage. In the lower court where the defense of the fire statute was not raised, the court found in favor of the cargo owner. On appeal, the fire statute defense was raised and the Appellate Court held it a valid defense, subject to further testimony in view of the failure to raise the defense at the trial court, saying:

> "It is settled law that unseaworthiness in itself does not constitute such neglect, and moreover, that to deny exemption the negligence must be that of the owner himself or his managing of-

ficers. Thus, while under the Harter Act, the negligence of a ship's employee is imputable to the vessel owner, under the fire statute it is not."

In *Petition of Kinsman Transit Company,* 338 F. 2d 708 (2nd Cir. 1964), the master of a vessel was delegated the duty of securing it for the winter lay-up on the Great Lakes. He did so negligently and, as a result, the vessel broke loose and drifted downstream, damaging other vessels and a bridge. The court said, in dealing with the distinction between exoneration and limitation, at pages 715 and 716:

> "They [owners] were not negligent in assigning the task to Davies [the master], whose competence was established. Davies was not 'sufficiently high' under the authorities cited below. *His knowledge is imputed to the corporation on the issue of exoneration, but that is precisely what the statute forbids on the issue of limitation"* (Emphasis added).

In *Moore-McCormack Lines, Inc. v. Armco Steel Corp., 272* F. 2d 873 (2nd Cir. 1959), owners of a vessel delegated to the master the responsibility for supervising stowage of bulk cargo in foreign ports and, in particular, the responsibility for assuring that the stowage was such as not to endanger the safety of the vessel. The master negligently performed this duty, prior to the commencement of a voyage at Vitoria, Brazil, with the result that the vessel departed unseaworthy and unstable. When the vessel encountered heavy seas, it floundered and finally overturned and sank with loss of life and total loss of cargo. A petition for exoneration from or limitation of liability for

the loss of life and cargo was filed by owners. At the trial court, exoneration and limitation were denied both as to loss of life and cargo damage. The Court of Appeals affirmed denial of exoneration with respect to both cargo and loss of life because of the negligence of the master, and further denied limitation with respect to loss of life because of the master's negligence in view of 46 U.S.C. Section 183 (e) imputing, in case of loss of life or bodily injury *only,* the privity or knowledge of the master at or prior to the commencement of the voyage to the owners. The Court of Appeals, however, reversed the District Court on the question of limitation of liability with respect to cargo damage. The appellate court held that the vessel owners had properly delegated to the master the duty of insuring proper stowage in foreign ports and that a failure of the master in this regard did not charge the owners with privity or knowledge with respect to cargo loss. See also *American Tobacco Co. v. The KAPINGO HADJIPATERA,* 81 F. Supp. 438 (S.D.N.Y. 1948).

Finally, in *Albina Engine & Mach. Works v. Hershey Chocolate Corp.,* 295 F. 2d 619 (9th Cir. 1961), owner's vessel while in port in Portland required repairs to a ladder in the No. 5 hold. Owners, Luckenbach, engaged an independent contractor, Albina, to make these repairs. The port engineer delegated to the vessel's chief engineer the duty of connecting the ship's water system with a fire hydrant on the wharf since a portion of the vessel's fire extinguishing line had also been removed for repairs. This duty in turn was delegated from the chief engineer to an assistant engineer. The assistant engineer negligently failed to perform the duty. During the process of repairing the

ladder, a welding spark ignited cargo on the vessel causing substantial damage. Cargo owners filed suit against both the shipowner and the independent contractor. The shipowner pleaded as a defense the fire statute portion of the Limitation of Liability statutes and filed an action against the independent contractor for indemnity. The trial court upheld the fire statute defense against the cargo owners, found in favor of the cargo owners against the independent contractor, and denied the independent contractor's claim for contribution from the shipowner. On appeal by the independent contractor, the basic question was whether or not the lower court was correct in finding no liability on the part of the shipowner to cargo as a result of the fire statute and thus no basis for contribution by the shipowner. This court dealt with the problem as follows:

> "As to cargo, the District Court held Luckenbach to be free from liability under 46 U.S.C. § 182, commonly known as the 'fire statute,' by the terms of which a ship's owner is freed from liability for fire damage to its cargo 'unless such fire is caused by the design or neglect of such owner.'
>
> "It is well established within the meaning of this statute that 'neglect of such owner' refers to the neglect of the owner personally or, in the case of a corporate owner, to the neglect of the managing officers and agents as distinguished from that of the master or other members of the crew or subordinate employees. *Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo,* 1943, 320 U.S. 249, 64 S.Ct. 15, 88 L.Ed. 30.
>
> "Albina contends that the neglect of Luckenbach was attributable to its port engineer and its marine superintendent and that both of these persons were managing officers and agents.

"As to the port engineer, the District Court found that he had arranged with the ship's chief engineer for the providing of an alternate fire line and that the responsibility for the ship's failure to provide such a line lay with that ship's officer and not with any managing officer of the company. The court found that the delegation of this task was proper. As to the marine superintendent, whom Albina contends had responsibility for clearing the hold, the District Court found him 'a mere subordinate employee' and not a managerial officer.

"We are satisfied that these findings cannot be held clearly erroneous. The fire statute then applied to free Luckenbach from liability to cargo."

It is clear, therefore, that the continuing and consistent interpretation of the Limitation of Liability Acts has been and remains that a corporate vessel owner is entitled to limit its liability if, assuming a failure to exercise due diligence to make seaworthy to have been established, it is found that such negligence was not that of a managing or supervising representative of the vessel owner. The test was clearly stated by the Supreme Court in *Coryell v. Phipps,* 317 U.S. 406, 87 L. Ed. 363 (1943), when the court said:

"In those cases [involving corporate shipowners] it is held that liability may not be limited under the statute where the negligence is that of an executive officer, manager or superintendent whose scope of authority includes supervision over the phase of the business out of which the loss or injury occurred. . . . A corporation necessarily acts through human beings. The privity of some of those persons must be the privity of the corporation else it could always limit its liability. Hence, the search in those cases to see where in the managerial hierarchy the fault lay."

D. The Proper Relationship Between Limitation of Liability and the Due Diligence to Make Seaworthy Standard of the Harter Act and Cogsa.

As has been demonstrated, for the purposes of the Limitation of Liability Act there is no general nondelegable duty upon the shipowner to utilize due diligence to make its vessel seaworthy at the commencement of its voyage. Thus Finding of Fact 6 in the instant action relating to Appellant's privity, fault and knowledge under the Limitation of Liability Statutes is predicated on an erroneous legal concept when it commences by stating:

> "It was the Waterman Steamship Company's obligation to exercise due diligence to make the SS CHICKSAW seaworthy at the commencement of the voyage to the Far East."

This is not to say, however, that there is no relationship between a denial of exoneration under Cogsa and Limitation of Liability in an action such as the instant one combining both elements in the same law suit. As is demonstrated by *States Steamship Co. v. United States,* 259 F. 2d 459 (9th Cir. 1958), such a relationship does exist. This relationship is a purely procedural one arising from the fact that both limitation of liability and exoneration under Cogsa are in turn related to the concept of unseaworthiness.

The relationship between limitation of liability and unseaworthiness of the vessel comes not from special duties created by Cogsa but from the portion of the Limitation of Liability Act requiring a denial of limitation if the loss is with the privity or knowledge of owners. In this context owners means simply the

managerial or supervisory personnel of owners, *Moore McCormack v. Armco Steel Corp.,* 272 F. 2d 873, 876 (2nd Cir. 1959). Thus a proper statement of the relationship between vessel unseaworthiness and limitation of liability is that, in the case of a corporate owner, if personnel at the managerial level have either actual knowledge of an unseaworthy condition or knowledge of facts that give notice of probable unseaworthiness, thus giving rise to a duty to act or inquire, and there is a failure on said personnel's part to act or inquire, limitation will be denied.

The relationship between Cogsa and unseaworthiness of the vessel, on the other hand, does stem from a special, non-delegable, statutory, duty on the shipowner to exercise due diligence to make its vessel seaworthy at and prior to the commencement of the voyage.

Thus the relationship between denial of exoneration under Cogsa and limitation of liability when both are raised in the same law suit is simply stated:

If exoneration is denied because of a failure to exercise due diligence to make the vessel seaworthy prior to the commencement of the voyage, it is then incumbent upon the shipowner, in order to obtain the benefits of the Limitation of Liability Statute, to demonstrate that the failure to exercise due diligence was that of the master or officers of the vessel or of some non-supervisory, non-managerial shoreside personnel. If the shipowner succeeds in establishing this fact then limitation must be granted despite a denial of exoneration. See *Port of Pasco v. Pacific Inland Navigation Co., Inc.,* 324 F. 2d 593 (9th Cir. 1963), at page 599.

E. The Negligence of Captain Patronas Should Not Be Imputed to Appellant to Deny Limitation of Liability.

In all of the lower court's Findings of Fact and Conclusions of Law in this action, only one negligent act is found. That act was the failure of Captain Patronas to exercise due diligence to make the fathometer seaworthy when, with knowledge of uncertainty with respect to its condition, he took no steps to repair or check it [Finding of Fact (5) R. 847]. Thus, limitation of liability could properly be denied only if Captain Patronas' negligence under the law is imputed to Appellant. Finding of Fact (6) R. 848 makes it explicit that no supervisory or managerial personnel were involved in Captain Patronas' negligence. It is clear that under the law Patronas' negligence is not imputed to Appellant to deny limitation of liability. The "search . . . to see where in the managerial hierarchy the fault lay" (*Coryell v. Phipps, supra*) ends with Captain Patronas. Paraphrasing the Second Circuit *In Petition of Kinsman Transit Co., supra,* Patronas was not sufficiently high. His knowledge is imputed to the corporation on the issue of exoneration, but that is precisely what the statute forbids on the issue of limitation.

V.

Conclusion.

We respectfully submit that for the foregoing reasons the decision of the District Court should be reversed.

GRAHAM & JAMES,
LEO J. VANDER LANS,
DON A. PROUDFOOT, JR.,
Attorneys for Appellant Waterman Steamship Corporation.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DON A. PROUDFOOT, JR.

APPENDIX.

Table of Exhibits.

Exhibit	(Exhibits 1 through 111 were offered and received as joint exhibits of claimants and petitioner.)		
1	Joint Exhibit 1 Safety Equipment Issued November 11, 1960	Tr. 22	Tr. 22
2	Joint Exhibit 2 Safety Radio Certificate	Tr. 22	Tr. 22
3	Joint Exhibit 3 Coast Guard Certificate of Inspection Issued November 11, 1960	Tr. 22	Tr. 22
4	Joint Exhibit 4 Hull Inspection Book	Tr. 22	Tr. 22
5	Joint Exhibit 5 International Load Line Certificate-December 5, 1961	Tr. 22	Tr. 22
6	Joint Exhibit 6 Vessel Inspection Record	Tr. 22	Tr. 22
7	Joint Exhibit 7 Standing Orders	Tr. 22	Tr. 22
8	Joint Exhibit 8 Message	Tr. 22	Tr. 22
9	Joint Exhibit 9 Message	Tr. 22	Tr. 22
10	Joint Exhibit 10 Message	Tr. 22	Tr. 22
11	Joint Exhibit 11 Message	Tr. 22	Tr. 22
12	Joint Exhibit 12 Message	Tr. 22	Tr. 22
13	Joint Exhibit 13 Message	Tr. 22	Tr. 22
14	Joint Exhibit 14 Coast and Geodetic Survey Chart No. 5202 (copy)	Tr. 22	Tr. 22
15	Joint Exhibit 15 Coast and Geodetic Survey Chart No. 5002	Tr. 22	Tr. 22
16	Joint Exhibit 16 Message	Tr. 22	Tr. 22

	Exhibit	Identified	Received
17	Joint Exhibit 17 Message	Tr. 22	Tr. 22
18	Joint Exhibit 18 Message	Tr. 22	Tr. 22
19	Joint Exhibit 19 Message	Tr. 22	Tr. 22
20	Joint Exhibit 20 Message	Tr. 22	Tr. 22
21	Joint Exhibit 21 Message	Tr. 22	Tr. 22
22	Joint Exhibit 22 Mackay Radio Instruction Book	Tr. 22	Tr. 22
23	Joint Exhibit 23 Pilot Chart	Tr. 22	Tr. 22
24	Joint Exhibit 24 Diagram of Fathometer Dial	Tr. 22	Tr. 22
25	Joint Exhibit 25 Sounding Book	Tr. 22	Tr. 22
26	Joint Exhibit 26 Rough Deck Log No. 2 Voyage No. 129	Tr. 22	Tr. 22
27	Joint Exhibit 27 Smooth Deck Log No. 1 Voyage No. 129	Tr. 22	Tr. 22
28	Joint Exhibit 28 Smooth Deck Los No. 2 Voyage No. 129	Tr. 22	Tr. 22
29	Joint Exhibit 29 Smooth Engine Log No. 1 Voyage No. 129	Tr. 22	Tr. 22
30	Joint Exhibit 30 Smooth Engine Log No. 2 Voyage No. 129	Tr. 22	Tr. 22
31	Joint Exhibit 31 Smooth Engine Log No. 3 Voyage No. 129	Tr. 22	Tr. 22
32	Joint Exhibit 32 Rough Engine Log No. 3 Voyage No. 129	Tr. 22	Tr. 22
33	Joint Exhibit 33 Engine Bell Book	Tr. 22	Tr. 22
34	Joint Exhibit 34 Coast and Geodetic Survey Chart No. 5002	Tr. 22	Tr. 22

	Exhibit	Identified	Received
35	Joint Exhibit 35 RDF Calibration Table	Tr. 22	Tr. 22
36	Joint Exhibit 36 Mackay Form Calibration Chart and Curve	Tr. 22	Tr. 22
37	Joint Exhibit 37 Deviation Card for Standard Compass	Tr. 22	Tr. 22
38	Joint Exhibit 38 Azimuth Book	Tr. 22	Tr. 22
39	Joint Exhibit 39 Rough Deck Log No. 1 Voyage No. 128	Tr. 22	Tr. 22
40	Joint Exhibit 40 Rough Deck Log No. 2 Voyage No. 128	Tr. 22	Tr. 22
41	Joint Exhibit 41 Radio Beacon System Identification	Tr. 22	Tr. 22
42	Joint Exhibit 42 Hydrographic Office Chart 3000-6	Tr. 22	Tr. 22
43	Joint Exhibit 43 Coast and Geodetic Survey Chart No. 9000	Tr. 22	Tr. 22
44	Joint Exhibit 44 Hydrographic Office Chart 5799	Tr. 22	Tr. 22
45	Joint Exhibit 45 Pacific Coast and Pacific Island Light List, 1961	Tr. 22	Tr. 22
46	Joint Exhibit 46 Deck Bell Book	Tr. 22	Tr. 22
47	Joint Exhibit 47 Page from Deck Log Voyage No. 125	Tr. 22	Tr. 22
48	Joint Exhibit 48 Inside Front Cover Deck Log Voyage No. 125	Tr. 22	Tr. 22
49	Joint Exhibit 49 Diagram	Tr. 22	Tr. 22
50	Joint Exhibit 50 Smooth Deck Log Voyage No. 117	Tr. 22	Tr. 22

	Exhibit	Identified	Received
51	Joint Exhibit 51 Waterman "Instructions to Officers," 1947	Tr. 22	Tr. 22
52	Joint Exhibit 52 Coast and Geodetic Survey Chart No. 5202	Tr. 22	Tr. 22
53	Joint Exhibit 53 Rough Deck Log No. 1 Voyage No. 129	Tr. 22	Tr. 22
54	Joint Exhibit 54 Radar Log	Tr. 22	Tr. 22
55	Joint Exhibit 55 Radio Log	Tr. 22	Tr. 22
56	Joint Exhibit 56 Hull Inspection Book	Tr. 22	Tr. 22
57	Joint Exhibit 57 Motor Vehicle Inspection Record and Cover Letter	Tr. 22	Tr. 22
58	Joint Exhibit 58 Waterman Bulletin December 27, 1955	Tr. 22	Tr. 22
59	Joint Exhibit 59 Waterman Bulletin April 11, 1956	Tr. 22	Tr. 22
60	Joint Exhibit 60 Waterman Bulletin July 9, 1958	Tr. 22	Tr. 22
61	Joint Exhibit 61 Waterman Bulletin July 12, 1960	Tr. 22	Tr. 22
61	Joint Exhibit 62 Patronis' Service Record	Tr. 22	Tr. 22
63	Joint Exhibit 63 Letter dated October 30, 1961	Tr. 22	Tr. 22
64	Joint Exhibit 64 Patronis' Service Record	Tr. 22	Tr. 22
65	Joint Exhibit 65 RDF Calibration (Form)	Tr. 22	Tr. 22
66	Joint Exhibit 66 RDF Calibration Record (Form)	Tr. 22	Tr. 22
67	Joint Exhibit 67 RCA Work Order	Tr. 22	Tr. 22
68	Joint Exhibit 68 FCC Form 801	Tr. 22	Tr. 22
69	Joint Exhibit 69 Form F.E. 813	Tr. 22	Tr. 22

	Exhibit	Identified	Received
70	Joint Exhibit 70 FCC Form 807	Tr. 22	Tr. 22
71	Joint Exhibit 71 Letter signed by J. English November 3, 1961	Tr. 22	Tr. 22
72	Joint Exhibit 72 Waterman Bulletin November 30, 1956	Tr. 22	Tr. 22
73	Joint Exhibit 73 Waterman Bulletin April 9, 1957	Tr. 22	Tr. 22
74	Joint Exhibit 74 Waterman Bulletin February 14, 1958	Tr. 22	Tr. 22
75	Joint Exhibit 75 Waterman Bulletin August 12, 1958	Tr. 22	Tr. 22
76	Joint Exhibit 76 Waterman Bulletin October 29, 1958	Tr. 22	Tr. 22
77	Joint Exhibit 77 Waterman Bulletin March 13, 1959	Tr. 22	Tr. 22
78	Joint Exhibit 78 Waterman Bulletin November 12, 1959	Tr. 22	Tr. 22
79	Joint Exhibit 79 Waterman Bulletin December 17, 1959	Tr. 22	Tr. 22
80	Joint Exhibit 80 Waterman Bulletin January 7, 1960	Tr. 22	Tr. 22
81	Joint Exhibit 81 Waterman Bulletin April 6, 1960	Tr. 22	Tr. 22
82	Joint Exhibit 82 Waterman Bulletin May 4, 1960	Tr. 22	Tr. 22
83	Joint Exhibit 83 Waterman Bulletin June 21, 1960	Tr. 22	Tr. 22
84	Joint Exhibit 84 Waterman Bulletin February 20, 1961	Tr. 22	Tr. 22
85	Joint Exhibit 85 Waterman Bulletin April 24, 1961	Tr. 22	Tr. 22

	Exhibit	Identified	Received
86	Joint Exhibit 86 Waterman Bulletin May 5, 1961	Tr. 22	Tr. 22
87	Joint Exhibit 87 Waterman Bulletin May 25, 1961	Tr. 22	Tr. 22
88	Joint Exhibit 88 Waterman Bulletin June 14, 1961	Tr. 22	Tr. 22
89	Joint Exhibit 89 Waterman Bulletin July 6, 1961	Tr. 22	Tr. 22
90	Joint Exhibit 90 Waterman Bulletin July 21, 1961	Tr. 22	Tr. 22
91	Joint Exhibit 91 Waterman Bulletin September 12, 1961	Tr. 22	Tr. 22
92	Joint Exhibit 92 Waterman Bulletin October 7, 1961	Tr. 22	Tr. 22
93	Joint Exhibit 93 Waterman Bulletin October 24, 1961	Tr. 22	Tr. 22
94	Joint Exhibit 94 Waterman Bulletin January 25, 1962	Tr. 22	Tr. 22
95	Joint Exhibit 95 Waterman Bulletin (Radar Course) February 9, 1962	Tr. 22	Tr. 22
96	Joint Exhibit 96 Waterman Bulletin February 9, 1962	Tr. 22	Tr. 22
97	Joint Exhibit 97 Marine Safe Practice Pamphlet—February 1956	Tr. 22	Tr. 22
98	Joint Exhibit 98 Marine Safe Practice Pamphlet—August 1955	Tr. 22	Tr. 22
99	Joint Exhibit 99 Marine Safe Practice Pamphlet—July 1955	Tr. 22	Tr. 22
100	Joint Exhibit 100 Marine Safe Practice Pamphlet—May 1954	Tr. 22	Tr. 22

	Exhibit	Identified	Received
101	Joint Exhibit 101 Letter to All Masters June 2, 1953	Tr. 22	Tr. 22
102	Joint Exhibit 102 Letter to All Masters December 10, 1953	Tr. 22	Tr. 22
103	Joint Exhibit 103 Load Line and Boiler Surveys	Tr. 22	Tr. 22
104	Joint Exhibit 104 Load Line Inspection	Tr. 22	Tr. 22
105	Joint Exhibit 105 Waterman Bulletin May 20, 1960	Tr. 22	Tr. 22
106	Joint Exhibit 106 Form 448—Rev.	Tr. 22	Tr. 22
107	Joint Exhibit 107 Letter to Pearson May 12, 1961	Tr. 22	Tr. 22
108	Joint Exhibit 108 Waterman Telegram to Cargo Interest-February 11, 1962	Tr. 22	Tr. 22
109	Joint Exhibit 109 Prem Telegram to Waterman February 14, 1962	Tr. 22	Tr. 22
110	Joint Exhibit 110 Waterman Bulletin August 30, 1960	Tr. 22	Tr. 22
111	Joint Exhibit 111 Waterman Organizational Manual October 10, 1955	Tr. 22	Tr. 22
112	Petitioner's 112 Chart	Tr. 502	Tr. 624
113	Petitioner's 113 Photo CHICKASAW aground	Tr. 623	Tr. 623
114	Petitioner's 114 Chart	Tr. 622	Tr. 623
115	Petitioner's 115 Anthony deposition	Tr. 1237	Tr. 1237
116	Petitioner's 116 Weekley deposition	Tr. 1272	Tr. 1272
117	Petitioner's 117 McKenzie deposition	Tr. 1280	Tr. 1280
118	Petitioner's 118 McKenzie deposition exhibit	Tr. 1280	Tr. 1280

	Exhibit	Identified	Received
119	Petitioner's 119 Walsh deposition	Tr. 1318	Tr. 1318
120	Petitioner's 120 Murdock deposition	Tr. 1404	Tr. 1404
121	Claimants' A Patronis deposition	Tr. 289	Tr. 289
122	Claimants' B Filippone deposition	Tr. 404	Tr. 404
123	Claimants' C Kyriakos deposition	Tr. 419	Tr. 419
124	Claimants' D Williams deposition	Tr. 429	Tr. 429
125	Claimants' E Henkle deposition	Tr. 434	Tr. 434
126	Claimants' F Miller deposition	Tr. 443	Tr. 443
127	Claimants' G Simms deposition	Tr. 462	Tr. 462
128	Claimants' H Jensen deposition	Tr. 677	Tr. 683
129	Claimants' I Coast Guard transcript	Tr. 678	Tr. 1091
130	Claimants' J Notice of deposition	Tr. 678	
131	Claimants' K Dixon deposition	Tr. 718	Tr. 718
132	Claimants' L English deposition	Tr. 730	Tr. 730
133	Claimants' M Hall deposition	Tr. 935	Tr. 935
134	Claimants' N Kroh deposition	Tr. 973	Tr. 973
135	Claimants' O Solnordal deposition	Tr. 1004	Tr. 1004
136	Claimants' P Vinson deposition	Tr. 1018	Tr. 1018
137	Claimants' Q Pearson deposition	Tr. 1030	Tr. 1030
138	Claimants' R Keith deposition	Tr. 1053	Tr. 1053
139	Claimants' S Suzuki, Iriya & Nelson depos	Tr. 1056	Tr. 1056
140	Claimants' T Letter dated February 13, 1962	Tr. 1097	Tr. 1097

	Exhibit	Identified	Received
141	Claimants' U Statement and Report of Haldane	Tr. 1334	Tr. 1346
142	Claimants' V Back weather reports	Tr. 1433	Tr. 1435
143	Claimants' W Aviation forecast	Tr. 1434	Tr. 1435
144	Claimants' X Weather Department code	Tr. 1434	Tr. 1435
145	Claimants' Y Deposition of Samuel Wylie	Tr. 1488	Tr. 1489
146	Claimants' Z Deposition of Ray Carroll	Tr. 1488	Tr. 1489
147	Claimants' AA Deposition of Lawrence Foley	Tr. 1488	Tr. 1489
148	Claimants' BB Deposition of Curtis Hatchell, Jr.	Tr. 1488	Tr. 1489
149	Claimants' CC Deposition of James Koenig	Tr. 1488	Tr. 1489
150	Claimants' DD Deposition of Frank Kustura	Tr. 1488	Tr. 1489
151	Claimants' EE Deposition of James Mastin	Tr. 1488	Tr. 1489
152	Claimants' FF Deposition of Henry Peterson	Tr. 1488	Tr. 1489
153	Claimants' GG Deposition of Francisco Oliva	Tr. 1488	Tr. 1489
154	Claimants' HH Deposition of Jose Alonzo, Jr.	Tr. 1488	Tr. 1489
155	Claimants' II Deposition of George Champlin	Tr. 1488	Tr. 1489
156	Claimants' JJ Deposition of James Fleming	Tr. 1488	Tr. 1489
157	Claimants' KK Deposition of George Armstrong	Tr. 1488	Tr. 1489
158	Claimants' LL Deposition of Alebtr Ayler	Tr. 1488	Tr. 1489
159	Claimants' MM Deposition of Edward Brevier	Tr. 1488	Tr. 1489
160	Claimants' NN Deposition of Malcolm Cieutat	Tr. 1488	Tr. 1489
161	Claimants' OO Deposition of William Jones	Tr. 1488	Tr. 1489
162	Claimants' PP Deposition of Howard F. Menz	Tr. 1488	Tr. 1489

	Exhibit	Identified	Received
163	Claimants' QQ Deposition of Demetrios Miofax	Tr. 1488	Tr. 1489
164	Claimants' RR Deposition of Francis Peredine	Tr. 1488	Tr. 1489
165	Claimants' SS Deposition of Joseph A. Robertson	Tr. 1488	Tr. 1489
166	Claimants' TT Deposition of James Slay	Tr. 1488	Tr. 1489
167	Claimants' UU Deposition of Vernon L. Stieberg	Tr. 1488	Tr. 1489
168	Claimants' VV Deposition of Irwin W. Sudduth	Tr. 1488	Tr. 1489
169	Claimants' WW Deposition of Victor A. Valencia	Tr. 1488	Tr. 1489
170	Claimants' XX Deposition of Edward Webb	Tr. 1488	Tr. 1489
171	Claimants' YY Deposition of George Williams	Tr. 1488	Tr. 1489
172	Claimants' ZZ Deposition of Cleveland Wolfe, Jr.	Tr. 1488	Tr. 1489
173	Claimants' AAA Deposition of James Cantrill	Tr. 1488	Tr. 1489
174	Claimants' BBB Deposition of William F. Cogwell	Tr. 1488	Tr. 1489
175	Claimants' CCC Deposition of Albert Hammac	Tr. 1488	Tr. 1489
176	Claimants' DDD Deposition of David Horton, Jr.	Tr. 1488	Tr. 1489

NOTE: By stipulation of the parties dated April 18, 1967, and Order signed by the Honorable Richard W. Chambers on April 26, 1967, both of which were filed May 1, 1967, it was agreed that the parties to this appeal would not designate those exhibits to be included in the record on appeal until ten days after the filing of Appellant's reply brief, in order to avoid the designation and transmittal of all of the many exhibits when it may develop, after the briefs have been submitted, that only a few are relevant to the appeal. Appellant therefore in this Appendix, in order to comply with Rule 18(2)(f), has included all exhibits identified at trial even though when the designation of exhibits is made pursuant to said stipulation and order, many of the exhibits listed in this Appendix may not become a part of the record on appeal.